UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CARRIE KING-HARDY,	:	
Plaintiff,	:	
	:	
-vs-	:	Civ. No. 3:01cv979 (PCD)
	:	
BLOOMFIELD BOARD OF EDUCATION, *et al.*,	:	
Defendants.	:	

RULINGS ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT, DEFENDANTS' MOTION TO BIFURCATE THE ISSUE OF PUNITIVE DAMAGES AND DEFENDANTS' MOTION TO STAY

Defendants move for summary judgment on plaintiff's complaint in its entirety.[1] Plaintiff moves for summary judgment on her counts alleging violation of her due process rights by depriving her of protected liberty and property interests and violation of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 *et seq.* For the reasons set forth herein, defendants' motion is granted on all counts except on plaintiff's count alleging that defendants' deprived her of a property interest without due process. Plaintiff's motion is denied. Defendants' motion to bifurcate the issue of punitive damages is denied as moot. Defendants' motion to stay is denied.

I. BACKGROUND

Plaintiff, an African-American diagnosed with multiple sclerosis, was a tenured teacher for defendant Bloomfield Board of Education ("Board") and the J.P. Vince Elementary School, having

[1] Defendants do not address plaintiff's equal protection claim in their motion for summary judgment and thus the rulings do not address the claim.

worked as either a special education teacher or a school psychologist for approximately twenty-six years. In April, 2001, she was discharged from her position as school psychologist by a majority vote of the Board for inadequate performance. Plaintiff alleges that she was discharged without proper consideration of a disability.

Defendants justified plaintiff's discharge with a number of documented deficiencies in plaintiff's performance as school psychologist. In 1991, she was placed on an intensive assistance plan because of deficiencies in interpreting psychological testing results, organizational skills and attendance at meetings. In November 1995, Nancy Stark, principal of the J.P. Vince Elementary School, noted plaintiff's scheduling deficiencies, tardiness and failure to complete testing information for planning and placement team ("PPT") meetings. In 1998, Stark's successor, Peter Azar, also noted her tardiness in reporting for work and in submitting reports, her failure to submit reports of acceptable quality and her failure provide quality presentations in PPT and child study team meetings. On January 20, 1999, Azar placed plaintiff on a Teacher Assistance Plan designed to correct identified deficiencies in her performance. On June 15, 1999, plaintiff's performance report identified her failure to meet district standards in ten different evaluation areas. As a result of her evaluation, plaintiff's participation in the Teacher Assistance Plan was extended for an additional six months. In December 1999, Azar recommended that plaintiff remain on the plan for failure to exhibit acceptable progress or attainment of her identified objectives.

During the above period, plaintiff did exhibit health issues. In 1999, plaintiff had difficulty walking. On August 16, 1999, plaintiff's treating physician, Marie Anne Denayer, in a letter to Paul Copes, Bloomfield Superintendent of Schools, and Azar, stated that plaintiff was under treatment for a

gait disorder and that she suffered from no neurological defects that would prevent plaintiff from performing her duties. Denayer recommended that plaintiff's work week be reduced to four days, that she provided access to a handicapped parking area and that plaintiff not have playground or cafeteria duty. Plaintiff was given a four-day work week and requested no other accommodation.

Notwithstanding plaintiff's health concerns, on August 28, 2000, Copes notified plaintiff that her termination was being processed and placed her on paid administrative leave. On September 28, 2000, plaintiff received written notice from Copes that her contract was being terminated. The stated reasons for termination were "inefficiency, incompetence and other due and sufficient cause" during the 1998-99 and 1999-2000 school years.

On October 12, 2000, plaintiff requested a hearing on her termination. Plaintiff, through counsel, selected a hearing panel under the procedures set forth in CONN. GEN. STAT. § 10-151. Plaintiff selected one panel member and the school administration selected the remaining two members. The hearing began on November 8, 2000 and lasted six days. Plaintiff's attorney was permitted to examine witnesses at the hearing. Plaintiff's attorney sought to establish that plaintiff's performance was attributable to a disability and that plaintiff was not provided reasonable accommodations. Plaintiff's attorney attempted to offer the testimony of her treating physician and argued that her condition impacted her mobility and may have an effect on plaintiff's memory. Prior to the hearing, plaintiff did not state that her mobility affected her performance of her duties, nor did she provide a medical report of her condition. Plaintiff did not call witnesses at the hearing. The parties were also permitted to file post-trial briefs, which plaintiff declined to do. The panel unanimously recommended termination of plaintiff's contract due to inefficiency and incompetence.

On March 23, 2001, plaintiff received the findings and recommendations of the panel. By letter dated April 5, 2001, plaintiff was notified of the meeting scheduled for April 9, 2001 in which the Board would review the findings and recommendations of the panel and that plaintiff could request that the meeting be held in open session.[2] On April 9, 2001, a special meeting of the Board was held, attended by plaintiff and counsel, at which neither plaintiff nor her counsel asked to address the Board.[3] The Board voted to discharge plaintiff. Plaintiff did not file an appeal of the Board's decision in state court.

On December 18, 2000, plaintiff filed a complaint with the Connecticut Commission on Human Rights and Opportunities (CHRO) alleging discrimination by Copes, Azar and the Board of Education based on race and disability. Defendants were notified of the complaint on January 8, 2001. Plaintiff filed the present complaint on May 31, 2001.

III. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendants move for summary judgment on counts alleging (1) violation of 42 U.S.C. § 1983, (2) violation of 42 U.S.C. § 1981, (3) violation of Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.* and § 504 of the Rehabilitation Act, 29 U.S.C. § 794 (§ 504), (4) violation of the FMLA, (5) breach of an implied covenant of good faith and fair dealing, (6) intentional infliction of emotional distress, (7) defamation and (8) negligent infliction of emotional distress. Defendants also move for summary judgment on their defense of qualified immunity and lack of jurisdiction over the

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[2] Although plaintiff elected that the meeting be held in open session, it was held as a special meeting of the Board.

[3] Plaintiff's counsel argues that, although she never spoke before the Board, she did raise her hand to address the Board and was informed that only Board members were entitled to speak.

claims for plaintiff's failure to exhaust administrative remedies.

A. Standard of Review

A party moving for summary judgment must establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. FED. R. CIV. P. 56 (c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248,106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In determining whether a genuine issue has been raised, all ambiguities are resolved and all reasonable inferences are drawn against the moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980). Summary judgment is proper when reasonable minds could not differ as to the import of evidence. *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir. 1991). Determinations as to the weight to accord evidence or credibility assessments of witnesses are improper on a motion for summary judgment as such are within the sole province of the jury. *Hayes v. N.Y. City Dep't of Corr.*, 84 F.3d 614, 619 (2d Cir. 1996).

B. Violation of 42 U.S.C. § 1983

Defendants argue that the procedures provided by CONN. GEN. STAT. § 10-151 were sufficient to ensure that plaintiff was not denied due process. Plaintiff responds that the refusal to hear evidence of a disability and the subsequent refusal to let her speak before the Board of Education violated her due process rights.

In order to establish defendants' liability under § 1983, plaintiff must establish that (1) defendants deprived her of a right secured by the Constitution and laws of the United States and (2)

this deprivation was under color of state law. *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 250 (2d Cir. 2001). Defendants limit their motion to plaintiff's failure to establish that they deprived her her right to due process.

The elements of due process claim require (1) identification of a protected liberty or property interest and (2) denial of that interest without due process. *McMenemy v. Rochester*, 241 F.3d 279, 285-86 (2d Cir. 2001). The parties do not dispute that plaintiff, as a tenured teacher,[4] has a property interest in her continued employment. *See Strong v. Bd. of Educ.*, 902 F.2d 208, 211 (2d Cir. 1990); CONN. GEN. STAT. § 10-151; *Rado v. Bd. of Educ.*, 216 Conn. 541, 555-56, 583 A.2d 102 (1990). The parties do however dispute whether plaintiff's termination implicates a liberty interest.

The only liberty interest implicated by plaintiff's discharge is her interest in preserving her "good name, reputation, honor or integrity." *Bd. of Regents v. Roth*, 408 U.S. 564, 573, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972). Defamation of one's professional competency accompanied by termination of government employment or deprivation of some other right or status suffices to establish a liberty interest. *Valmonte v. Bane*, 18 F.3d 992, 1000 (2d Cir. 1994). Defamation alone will not suffice to establish a liberty interest. *See id.* There also must also be public disclosure of the stigmatizing statements as was satisfied in the present case by defendants' placing a record of the termination in plaintiff's personnel file where it could be disclosed to prospective employers. *See Donato v. Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623, 631 (2d Cir. 1996). Plaintiff's alleged liberty interest falters on the requirement that she show as "[t]he gravamen of 'stigma' as part of

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[4] The definition of "teacher" includes "each certified professional employee below the rank of superintendent employed by a board of education for at least ninety days in a position requiring a certificate issued by the State Board of Education." CONN. GEN. STAT. § 10-151(a)(2).

a due process violation is the making under color of law of a reputation-tarnishing statement that is *false*." *Doe v. Dep't of Public Safety ex rel. Lee*, 271 F.3d 38, 47-48 (2d Cir. 2001)(emphasis in original); *see also Codd v. Velger*, 429 U.S. 624, 627, 97 S. Ct. 882, 51 L. Ed. 2d 92 (1977); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 446 (2d Cir. 1980). The allegation that plaintiff may have been able to establish her ability to meet the requirements of her position if she received some accommodation for her disability will not establish a liberty interest. She must identify accommodations which would allow her to perform her position adequately, thus establishing the falsity of the charges by which she was discharged. An unsupported allegation that the charge of inadequate performance was false is not enough in response to a motion for summary judgment. *See Schwapp v. Avon*, 118 F.3d 106, 110 (2d Cir. 1997).

Plaintiff's property interest in her continued employment required that defendants provide her with notice of a potential deprivation of that interest and an opportunity for a hearing appropriate to her case. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). "The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546. The determination of whether she was deprived of due process rests on the adequacy of the pre-deprivation procedures afforded her under § 10-151(d). See *Strong*, 902 F.2d at 211.

As a general matter, the procedure provided need not be a full evidentiary hearing but should provide "an initial check against mistaken decisions--essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Cleveland Bd. of Educ.*, 470 U.S. at 545-46. CONN. GEN. STAT. § 10-151(d) includes

advance notice of the bases for termination, a hearing before a three-member panel, a review of the legal conclusions of the panel by the Board and the opportunity for review of the decision by the superior court, none of which were denied to plaintiff. Plaintiff, however, argues that the available procedures were inadequate because she was unable to present her side of the story by restrictions imposed on her in the proceedings. Specifically, she was not permitted to present evidence of her disability to the panel.

Under the state statutory scheme, a tenured teacher has the right to continued employment unless cause for termination is established as defined by CONN. GEN. STAT. § 10-151(d);[5] *see Roth*, 408 U.S. at 577; *Sekor v. Bd. of Educ. of Ridgefield*, 240 Conn. 119, 129, 689 A.2d 1112 (1997). The panel notified plaintiff of the bases for her termination, specifically (1) "inefficiency and incompetence," *see* CONN. GEN. STAT. § 10-151(d)(1), and (2) "other due and sufficient cause," *see* CONN. GEN. STAT. § 10-151(d)(6). When plaintiff attempted to offer evidence of a disability at the hearing, the panel denied her offer[6] concluding that it was not charged with determining plaintiff's

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[5] CONN. GEN.. STAT. § 10-151(d) provides in relevant part: "The contract of employment of a teacher who has attained tenure shall be continued from school year to school year, except that it may be terminated at any time for one or more of the following reasons: (1) Inefficiency or incompetence, provided, if a teacher is notified on or after July 1, 2000, that termination is under consideration due to incompetence, the determination of incompetence is based on evaluation of the teacher using teacher evaluation guidelines established pursuant to section 10-151b; (2) insubordination against reasonable rules of the board of education; (3) moral misconduct; (4) disability, as shown by competent medical evidence; (5) elimination of the position to which the teacher was appointed or loss of a position to another teacher, if no other position exists to which such teacher may be appointed if qualified, provided such teacher, if qualified, shall be appointed to a position held by a teacher who has not attained tenure, and provided further that determination of the individual contract or contracts of employment to be terminated shall be made in accordance with either (A) a provision for a layoff procedure agreed upon by the board of education and the exclusive employees' representative organization, or (B) in the absence of such agreement, a written policy of the board of education; or (6) other due and sufficient cause."

[6] The panel ruled as follows: "The scope of this 10-151 hearing is framed by Joint Exhibit Number 3 which specifies the reasons for which the Administration seeks to terminate the teacher. That

disability and thus was without jurisdiction to hear evidence relevant to the same. The panel did afford plaintiff the opportunity to present contrary evidence relevant to the stated bases for termination. However, by denying plaintiff the opportunity to present disability evidence, she was unable to present a defense that may have accounted for her inability to meet performance standards, *i.e.*, through a reasonable accommodation by defendants she would have met performance standards. Although she was not terminated for her disability, evidence of her disability could have served as a defense to defendants' claim that she was incapable of performing her job. As she is not afforded the right to present facts at any other stage of the proceedings, this denied her a meaningful opportunity to be heard as to her ability to competently perform her responsibilities.

Plaintiff also argues that she was denied due process by the Board's refusal to let her speak before it rendered its decision and by permitting defendant Copes to address the Board. Defendants argue that the Board had no authority to hear new evidence or to make factual findings, but rather was required to accept the findings of the panel and its authority was limited to a review of legal conclusions recommended by the panel. *See Pagano v. Bd. of Educ. of Torrington*, 4 Conn. App. 1, 9, 492

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document identifies two of the six possible statutory reasons upon which termination of a tenured teacher may be predicated. Specifically, one, inefficiency or incompetence; and two, other due and sufficient cause. The panel must confine the evidence in this hearing to those enumerated charges and nothing more. To allow the consideration of evidence outside of those charges would cause this panel to exceed its jurisdiction. This narrow scope of our authority cuts both ways. It also prohibits the Administration from introducing evidence in this hearing of behaviors or actions on the part of the teacher other than those enumerated in Joint Exhibit 3. This panel has been convened under 10-151 not to determine the cause of the alleged inefficient or incompetent performance but to determine whether it existed and is sufficient to justify a recommendation of termination to the school board. Disability issues are beyond the scope not only of the panel's authority but also of our expertise. A majority of the panel rules today that any evidence of the teacher's disability and/or its effect on her job performance is beyond the scope of this inquiry and is therefore irrelevant and not admissible in this proceeding. Attorney Gould dissents from this ruling."

A.2d 197, *cert. denied*, 197 Conn. 809, 499 A.2d 60 (1985). Plaintiff therefore had her opportunity to speak at the prior hearing. Regardless of whether the Board relied on the panel's factual findings and was only empowered to arrive at a legal conclusion, the legal conclusion reached by the Board was the deprivation of plaintiff's property right. There is no evidence as to what Copes said, only that he was provided the opportunity to address the Board while plaintiff was not. The procedure need not allow plaintiff the opportunity to speak before the Board, *see Morgan v. United States*, 298 U.S. 468, 480-81, 56 S. Ct. 906, 80 L. Ed. 1288 (1936), however permitting only one side to speak before a decision is rendered establishes a genuine issue as to whether plaintiff's hearing constituted an opportunity to be heard at a meaningful time. Defendants' motion for summary judgment is granted as to the due process claim alleging deprivation of plaintiff's liberty interest but denied as to the count alleging deprivation of plaintiff's property interest.

C. Violation of 42 U.S.C. § 1981

Defendants argue that plaintiff offers no basis on which to substantiate her alleged violation of § 1981. Plaintiff responds that the circumstances of her discharge refute defendants' argument.

A violation of § 1981 requires that plaintiff allege facts supporting that (1) she is a member of a racial minority; (2) defendants intended to discriminate against her on the basis of her race and (3) the discrimination concerned one or more of the activities enumerated in the statute. *See Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir. 1993). Enumerated activities include the right "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property." 42 U.S.C. § 1981(a). Section 1981 is limited to claims of intentional discrimination. *General Bldg. Contractors*

Ass'n v. Pennsylvania, 458 U.S. 375, 391, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982).

A prima facie case of discrimination requires that plaintiff establish (1) membership in a protected class, (2) satisfactory performance of assigned duties, (3) that she was discharged, and (4) that her discharge occurred under circumstances invoking an inference of discrimination based on membership in that class. *McLee v. Chrysler Corp.*, 109 F.3d 130, 134 (2d Cir. 1997). The burden that plaintiff must meet to establish these elements is de minimis, *id.*, however, plaintiff must offer more than conclusory allegations to withstand a motion for summary judgment. *Schwapp*, 118 F.3d at 110.

Plaintiff argues that performance in the position from which she was terminated is irrelevant, and she need only establish her qualifications for the position from which she was discharged. This interpretation of the discrimination standard set forth in *Owens v. N.Y. City Hous. Auth.*, 934 F.2d 405 (2d Cir. 1991), was flatly rejected in *Thornley v. Penton Pub., Inc.*, 104 F.3d 26, 29-30 (2d Cir. 1997). Plaintiff must, as part of her prima facie case, establish that her performance was satisfactory. The undisputed facts indicate otherwise.

Concerns as to plaintiff's performance were initially raised by her supervisors in 1995, but in 1998 and 1999 her deficiencies were sufficiently marked to cause intensive supervision of her work product. In 1999 and 2000, her performance was documented as deficient through evaluations and progress reports. Plaintiff failed to file reports promptly and failed to report to work on time. Although plaintiff may have shown some improvements while on the Teacher Assistance Plan, she still exhibited a number of deficiencies in her performance. Although plaintiff remarks that identified deficiencies may not have been the same from reporting period to reporting period, this does not establish that her work was satisfactory. The failure to meet this de minimis requirement is fatal to a § 1981 claim. *See*

McLee, 109 F.3d at 135 (affirming grant of summary judgment when plaintiff's performance held deficient because of tardiness, untimely reports and resulting poor evaluations). Summary judgment is therefore granted.

D. Violation of ADA & § 504

Defendants argue that plaintiff fails to establish that she could perform her job with or without accommodation. Plaintiff responds that she was capable of performing her responsibilities with some accommodation.[7]

Under the ADA, an employer may not discriminate against a "qualified individual with a disability because of the disability of such individual in regard to . . . discharge of employees." 42 U.S.C. § 12112(a). A prima facie case of discrimination under the ADA requires that plaintiff establish that (1) her employer is subject to the ADA; (2) she was disabled within the meaning of the ADA; (3) she was otherwise qualified, with or without reasonable accommodation, to perform the essential functions of her job and (4) she suffered adverse employment action because of her disability. *Giordano v. New York*, 274 F.3d 740, 747 (2d Cir. 2001). The elements of a violation of § 504 of the Rehabilitation Act are nearly identical to an ADA violation, requiring that plaintiff shows: (1) that she is "disabled" for purposes of the Rehabilitation Act; (2) that she was "otherwise qualified" for benefits

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[7] In her submission in opposition to defendants' motion for summary judgment, plaintiff provides a number of letters from Dr. Marie-Anne Denayer. In a letter dated October 2, 1990 to a Dr. Keshav Rao, Dr. Denayer stated that plaintiff "probably has" multiple sclerosis, but that plaintiff's condition was otherwise unremarkable. In a letter dated November 5, 1991, stamped as received by the Bloomfield Board of Education Administrative Offices, Dr. Denayer recommends reducing plaintiff's work week to three days because of plaintiff's treatment for Lyme disease. The next letter provided dated May 6, 1999 is a memorandum from defendant Azar inquiring as to her health after she became dizzy during a PPT and having observed that plaintiff was having some difficulty walking.

denied her; (3) that she was denied benefits "solely by reason" of her disability; and (4) that the benefits denied are part of a "program or activity receiving Federal financial assistance." *Doe v. Pfrommer*, 148 F.3d 73, 82 (2d Cir. 1998).

Under either the ADA or § 504, defendant is not liable if plaintiff cannot establish that she would be capable of performing the essential functions of her job with or without reasonable accommodation. "An individual is otherwise qualified for a job if she is able to perform the essential functions of that job, either with or without a reasonable accommodation." *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 135 (2d Cir. 1995). Plaintiff bears the burden of establishing that she is otherwise qualified for the position from which she was discharged. She must show "that she can meet the requirements of the job without assistance, or that an accommodation exists that permits her to perform the job's essential functions." *Id.* If she requires accommodation to meed job requirements, she bears the burden of identifying an effective accommodation, the cost of which does not clearly exceed its benefits, that potentially rends her otherwise qualified. *Id.* at 139.

Plaintiff identifies a mobility problem as one of the manifestations of her disability. She argues that with accommodation she was capable of performing all essential functions of her employment. Plaintiff further argues that the reasons for which she was terminated do not constitute essential functions of her employment. The only accommodation sought appears to be those requested in a letter from her physician, which accommodation was provided. Plaintiff alleges that, although she was provided a four-day work week, her day off was provided on Wednesday, the day on which training was scheduled, which exacerbated her performance deficiencies. To withstand a motion for summary judgment, plaintiff must identify a reasonable accommodation which, if implemented, would permit he to

perform the essential functions of her job. *See Kennedy v. Dresser Rand Co.*, 193 F.3d 120, (2d Cir. 1999), *cert. denied*, 528 U.S. 1190, 120 S. Ct. 1244, 146 L. Ed. 2d 103 (2000). Other than conclusory statements that accommodations exist that would allow her to perform her job, plaintiff has not identified a single accommodation not already provided her to date. *See Bonner v. New York State Elec. & Gas Corp.*, No. 00-CV-6101L, 00-CV-6118L, 2002 WL 553635, at *6 (W.D.N.Y. Mar. 28, 2002). She therefore has failed to establish a genuine issue of material fact as to her ability to perform her job with or without accommodation.

E. Violation of the FMLA

Defendants argue that plaintiff did not notify them of her intent to take FMLA leave, thus they cannot be held liable for alleged violations of the FMLA. Plaintiff responds that defendants were given sufficient notice.

The FMLA makes it unlawful for an employer "to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided," 29 U.S.C. § 2615(a)(1), or "to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by" the FMLA. 29 U.S.C. § 2615(a)(2). An employee should give an employer thirty days notice of an intention to take FMLA leave if advance notice is possible or as soon as practicable if leave is sought for an unforeseeable event. *See* 29 U.S.C. § 2612(e)(2). An employer may not discriminate against an employee who has used FMLA leave through denial of benefits or using the taking of leave as a negative factor in disciplinary actions. 29 C.F.R. § 825.220(c).

That plaintiff had a medical condition that may have entitled her to benefits under the FMLA does not in and of itself establish a violation of the FMLA. In the absence of evidence of direct

discrimination, a claim of discrimination for taking FMLA benefits is reviewed under burden shifting standard for employment discrimination as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-06, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *See Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 161 (1st Cir. 1998). Plaintiff must show that (1) she availed herself of a protected right under the FMLA; (2) she was adversely affected by an employment decision; (3) there is a causal connection between the employee's protected activity and the employer's adverse employment action. *Id.* Plaintiff must therefore establish a causal connection between an adverse action by defendants and her taking FMLA leave. *See Clay v. Chicago Dep't of Health*, 143 F.3d 1092, 1094 (7th Cir. 1998). An employer does not violate the FMLA when it takes an adverse action against an employee for poor performance. *See id.*; *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 172 (1st Cir. 1998).

Plaintiff argues that defendants "improperly used [her] serious medical condition and requested leave under the [FMLA] as a means to give her a poor evaluation and to deny [plaintiff's] in-service training during that time period." Plaintiff provides no support for her claims, invoking a tenuous causal connection between her tardiness and her negative performance evaluations based in-part on her tardiness. Her theory appears to be that 29 C.F.R. § 825.203(a) allows an employee to take intermittent leave, defined as "FMLA leave taken in separate blocks of time due to a single qualifying reason," or leave on a reduced schedule, defined as "a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday," thus the FMLA excused her tardiness. Plaintiff does not provide any indication that she sought and was denied some form of leave

to excuse her tardiness, which would support an FMLA violation.[8] Plaintiff's argument that defendants scheduled her time off with the intent of denying her training thus causing other adverse performance issues for want of training is equally unsupported. Her FMLA claim is thus no more than a conclusory allegation that defendants took adverse employment actions as a consequence of her taking FMLA leave. *See Hodgens*, 144 F.3d at 161. Absent some causal connection, her FMLA claim fails. Summary judgment is granted on plaintiff's FMLA claim.

E. Breach of an Implied Covenant of Good Faith and Fair Dealing

Defendants argue that plaintiff has provided no factual basis on which to support a claimed breach of an implied covenant of good faith and fair dealing and termination procedures were conducted in accordance with CONN. GEN. STAT. § 10-151(d). Plaintiff responds that "[t]he hearing was a sham and defendants have admitted that they conducted a 'one-sided' termination procedure in violation of the statutes cited."

Plaintiff does not specifically address defendant's argument, instead limiting her response to defendants' compliance with CONN. GEN. STAT. § 10-151. In her complaint, plaintiff alleges that the implied covenant of good faith and fair dealing required that

> [e]ach party in the relationship must act with fairness and good faith toward the other concerning all matters related to the employment; neither party would take any action to unfairly prevent the other from obtaining the benefits of the employment relationship including asserting rights to equal treatment under the law, receiving compensation for work performed; that plaintiff would be treated fairly and equitably and not be

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[8] The FMLA imposes some obligation on an employee to account for absences due to scheduled medical treatment, the inability to perform duties or recovery. *See* 29 C.F.R. § 825.203(c). The existence of a medical condition does not give an employee *carte blanche* to create her own schedule without communicating her circumstances to her employer. The evidence of her employer's attempts to ascertain her condition belie her claim that she provided any notice of a justification for her tardiness.

> disciplined or fired except for just cause; Defendant employer would similarly treat employees who are similarly situated; that defendants would comply with their own representations, rules, policies, and procedures in dealing with plaintiff; that Defendants would not treat plaintiff in an unfair manner. The parties further agreed that defendants would give plaintiff's interest as much consideration as they gave to their own and would not harass or fire her from her position without adequate or good cause.

Plaintiff is obligated to provide opposition in response to defendants' motion. A five-line response to defendants' memorandum in support of summary judgment that does not address the law of implied covenants of good faith and fair dealing fails to address defendants' argument, and similarly fails to establish any genuine issues of material fact that would preclude summary judgment. Defendants' motion is therefore granted. *See* D. CONN. L. CIV. R. 9(a).[9]

F. Intentional Infliction of Emotional Distress

Defendants argue that plaintiff fails to establish that their conduct was outrageous. Plaintiff responds that retaliatory conduct is itself outrageous thus precluding summary judgment.

To state a claim for intentional infliction of emotional distress, plaintiff must allege that (1) defendant intended to inflict emotional distress, or knew or should have known that it was a likely result of its conduct; (2) the conduct was extreme and outrageous; (3) the conduct caused plaintiff's distress; and (4) plaintiff's emotional distress was severe. *See DeLaurentis v. New Haven*, 220 Conn. 225, 266-67, 597 A.2d 807, 827-28 (1991). The "extreme and outrageous" standard requires that the conduct "exceed[] all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind." *Petyan v. Ellis*, 200

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[9] The express collective bargaining agreement providing the terms of plaintiff's contract incorporates the termination for cause provisions provided in CONN. GEN. STAT. § 10-151(d). To the extent that plaintiff's allegation argues the sufficiency of the procedures afforded her pursuant to § 10-151(d), her claim is addressed by the due process claim.

Conn. 243, 254 n.5, 510 A.2d 1337 (1986) (citation omitted). Whether conduct meets this standard requires determination by the court in the first instance. *See Collins v. Gulf Oil Corp.*, 605 F. Supp. 1519, 1522 (D. Conn. 1985).

Plaintiff argues that her allegation that defendants' retaliation for "filing a grievance, lawsuits and CHRO and EEOC administrative complaints" preclude summary judgment. This argument has two flaws. First, terminating an employee in retaliation for filing a discrimination complaint, despite being inappropriate or unlawful, is not extreme and outrageous. *See Huff v. West Haven Bd. of Educ.*, 10 F. Supp. 2d 117, 123 (D. Conn. 1998); *Lopez-Salerno v. Hartford Fire Ins. Co.*, No. 3:97CV273, 1997 WL 766890 (D. Conn. Dec. 8, 1997) (holding that terminating an employee on disability leave, just when she would have become eligible for long term disability benefits, was not extreme and outrageous); *Reed v. Signode Corp.*, 652 F. Supp. 129, 137 (D. Conn. 1986) (finding not extreme and outrageous to refuse leave of absence to employee needing cancer treatment); *see also Cox v. Keystone Carbon Co.*, 861 F.2d 390, 395-96 (3d Cir. 1988) (finding not extreme and outrageous to fire employee on first day back from work after triple bypass surgery and not fully recuperated). Second, plaintiff filed her complaint with the CHRO after defendants initiated procedures to discharge her. The actions taken by defendants were thus not in retaliation for any identified complaints, thus cannot be considered retaliatory. As plaintiff fails to establish that defendants' conduct was outrageous, summary judgment is granted on the intentional infliction of emotional distress claim.

H. Defamation

Defendants argue that they are entitled to summary judgment because plaintiff fails to identify any statements that were false when made and that they are protected by the defenses of truth and

qualified privilege.[10] Plaintiff responds that a statement that one lacks skill in her profession is defamatory thus precluding summary judgment.

Defamation consists of the torts of libel and slander, where libel is written defamation and slander is spoken defamation. *DeVito v. Schwartz*, 66 Conn. App. 228, 234, 784 A.2d 376 (2001). Liability for defamation requires that plaintiff establish that defendants (1) published false statements (2) that harmed plaintiff, and (3) that the defendants were not privileged to do so. *Kelley v. Bonney*, 221 Conn. 549, 563, 606 A.2d 693 (1992).

Plaintiff does not specifically identify a statement alleged to be false, instead alluding to "defamatory material of incompetence . . . in the personnel file" of plaintiff. Although this does not raise concern as to publication, *see Gaudio v. Griffin Health Services Corp.*, 249 Conn. 523, 545 n.23, 733 A.2d 197 (1999)(recognizing doctrine of intracorporate publication when statements about employee are included in her personnel file), the allegations do no more than describe the subject matter of statements made by defendants. Plaintiff thus fails to identify with specificity any statements alleged to be false or the author/speaker of the statement. Such failure has been found sufficient to dismiss an allegation of defamation for lack of specificity. *See Kelly v. Schmidberger*, 806 F.2d 44, 46 (2d Cir. 1986); *see also Wanamaker v. Columbian Rope Co.*, 713 F. Supp. 533, 545 (N.D.N.Y. 1989)(dismissing claim alleging "vague, conclusory statement that defendants defamed him by speaking or writing or circulating malicious, untrue and damaging comments

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[10] Defendants argue that plaintiff bears the burden of establishing the falsity of the statements pursuant to *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Under the circumstances of the present case, there is no evidence of plaintiff, a school psychologist, satisfying the definition of public official or public figure thereby invoking the *N.Y. Times Co.* standard.

about his job performance").

Assuming arguendo that plaintiff's allegation itself was sufficient, defendants would be protected by qualified privilege. A qualified privilege exists (1) if the occasion is one of privilege and (2) if the privilege is not abused. *Torosyan v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 234 Conn. 1, 28, 662 A.2d 89 (1995). If the occasion is one of privilege, plaintiff must establish malice in fact by defendants in publishing the alleged defamatory statements. *Id.* Communications by supervisors related to employee performance evaluations and the creation of documents related to terminations is an occasion of privilege satisfying the first element. *See id.* at 29. Plaintiff must therefore establish malice, which requires evidence of hatred, spite or ill will or any improper or unjustifiable motive by defendants. *See Bleich v. Ortiz*, 196 Conn. 498, 504, 493 A.2d 236 (1985). Plaintiff's response to this argument is "[t]he jury will find actual malice based on the fact that defendants knew about the circumstances of plaintiff's termination on the basis of alleged incompetence; they denied the plaintiff fair opportunity to dispute their allegations." This conclusory response does not raise a genuine issue as to whether plaintiff's negative performance evaluations or discharge was a product of improper motive on the part of defendants. Summary judgment is therefore granted on the count alleging defamation.

I. Negligent Infliction of Emotional Distress

As with the count alleging implied covenant of good faith and fair dealing, plaintiff's response states only that "a genuine issue of fact exists as to whether defendants' termination of plaintiff and the manner in which it was accomplished were negligent." This does not constitute an argument in opposition to defendants' motion. Plaintiff must identify specific facts precluding summary judgment. *See Celotex Corp.*, 477 U.S. at 322-23. The failure to oppose defendants argument would in itself

justify summary judgment on the claim. *See* D. CONN. L. CIV. R. 9(a).

Assuming arguendo that this argument were to be considered proper, defendants' motion for summary judgment would still be granted. In order to establish a claim of negligent infliction of emotional distress, plaintiff must show that defendants' "conduct involved an unreasonable risk of causing emotional distress and that distress, if it were caused, might result in illness or bodily harm." *Parsons v. United Techs. Corp.*, 243 Conn. 66, 88, 700 A.2d 655 (1997). In claims against an employer, plaintiff must show that defendants' conduct in the termination process was unreasonable. *Id.* Plaintiff does not establish that her employers acted unreasonably or deviated from established procedures. "The mere act of firing an employee, even if wrongfully motivated, does not transgress the bounds of socially tolerable behavior." *Id.* at 89 (internal quotation marks omitted). The motion for summary judgment is granted on the count alleging negligent infliction of emotional distress.

J. Claims Against Defendants Azar, Copes and Borelli Acting in Their Official Capacity

Defendants argue that plaintiff's claims against defendants Azar, Copes and Borelli acting in their official capacity are duplicative of her claims against defendant Bloomfield Board of Education. Plaintiff does not respond in her opposition to this argument.

Plaintiff's failure to respond to defendants' argument justifies summary judgment on the claim. *See* D. CONN. L. CIV. R. 9(a). Notwithstanding plaintiff's failure to respond, it is beyond question that claims against defendants in their official capacity are actually claims against the municipality itself. *Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991). All claims against defendants in their official capacity are therefore duplicitous of the claims against Bloomfield. The

motion for summary judgment is granted on all counts alleging violations by the three individual defendants acting in their official capacity.

K. Qualified Immunity of defendants Azar, Copes and Borelli

Defendants argue that defendants Azar, Copes and Borelli acted in accordance with statutory procedures for discharging plaintiff and thus qualified immunity precludes their being held liable. Plaintiff responds that the rights violated by defendants were sufficiently clear to preclude summary judgment.

A determination as to whether defendants are entitled to assert the defense of qualified immunity is a two-step inquiry. The first step requires the identification of a constitutional right violated by defendants' conduct. *See Koch v. Brattleboro, Vermont*, --- F.3d ----, NO. 875, 01-7504, 2002 WL 484982, at *2 (2d Cir. Mar. 29, 2002). If a violation is identified, the inquiry proceeds to a determination of whether the right violated was "clearly established." *See id.* The definition of the right must be sufficiently clear to place a reasonable official on notice that his actions would violate the right. *See id.* Defendants will be shielded from liability for civil damages "as long as [their] actions could reasonably have been thought consistent with the rights [they are] alleged to have violated." *Poe v. Leonard*, 282 F.3d 123 (2d Cir. 2002).

There can be no question that it is clearly established that an employee may not be deprived of a property interest in continued employment without due process. *See Munafo v. Metropolitan Transp. Authority,* 285 F.3d 201 (2d Cir. 2002). However, the existence of the defense is not determined by general due process principles but rather from "an individualized determination of the misconduct alleged." *Poe v. Leonard*, 282 F.3d 123.

The contours of the right must be sufficiently clear that a reasonable official would

> understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). Under the circumstances, the denial of due process is not clearly established.

Plaintiff focuses on two separate actions that allegedly denied her due process. The first action is the refusal of the panel to admit evidence of her disability. Whether this constitutes a denial of due process was not established at the time the panel rendered its decision. *See McCabe v. Caleel*, 739 F. Supp. 387, 390 (N.D. Ill. 1990). It is not clear whether the board's ruling was incorrect as a matter of state law nor had the statute on which the panel relied been found to be constitutionally infirm. As such, it cannot be said that the panel did not act reasonably under the circumstances.

The second action is the refusal of the board to let plaintiff or her attorney speak during the special session. It has been held by at least one Connecticut court that due process does not require that she be allowed to address the board. *See Pagano*, 4 Conn. App. at 9. Although allowing one party to address the board while denying the same opportunity to the other has the appearance of impropriety, it cannot be said that defendants' doing so was unreasonable in light of *Pagano*. Plaintiff may also not defeat the defense of qualified immunity by attacking portions of the entire procedure piecemeal. *See Munafo*, 285 F.3d 201. At the time the Board permitted Copes to speak and denied plaintiff the opportunity to do the same, plaintiff could have appealed the impropriety of doing so to the state court, and defendants presumably were aware of this. *See* CONN. GEN. STAT. § 10-151(e)(allowing state court to reverse decision of board, through CONN. GEN. STAT. § 4-183(j), for

"administrative findings, inferences, conclusions, or decisions . . . [i]n violation of constitutional or statutory provisions"); *Sekor v. Board of Educ. of Ridgefield*, 240 Conn. 119, 689 A.2d 1112 (1997)(reviewing due process claim); *Halpern v. Board of Education*, 45 Conn. Supp. 171, 186, 706 A.2d 1011 (1996)(reviewing constitutionality of board's refusal to hear evidence). Plaintiff may not defeat defendant's claim of qualified immunity by focusing on a single step in a multi-step procedure. *See Munafo*, 285 F.3d 201. Defendants' motion for summary judgment is granted as to the individual defendant's defense of qualified immunity.

L. Exhaustion of Available Remedies

Defendants argue that plaintiff's claims are barred for failure to appeal the board's decision to the state court pursuant to CONN. GEN. STAT. § 10-151(e). As a general principle, plaintiff need not exhaust state remedies before bringing an action under 42 U.S.C. § 1983. *Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 180, 118 S. Ct. 523, 139 L. Ed. 2d 525 (1997). As defendants cite no authority carving out an exception to that general rule, their motion for summary judgment on this ground is denied.

IV. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

For the reasons set forth above, plaintiff's motion for summary judgment on her count alleging a deprivation of a property interest without due process of law is denied as genuine issues of fact preclude summary judgment in her favor. Her motion for summary judgment on counts alleging a deprivation of a liberty interest without due process of law and violation of the FMLA are denied as moot in light of the ruling granting summary judgment in defendants' favor.

V. DEFENDANTS' MOTION TO BIFURCATE AND MOTION TO STAY

The ruling granting summary judgment on the individual defendants' claim of qualified immunity forecloses any claim of punitive damages. *See Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981)(holding punitive damages may not be awarded against a municipality); *Ciraolo v. New York*, 216 F.3d 236, 238 (2d Cir. 2000)(same). The motion to bifurcate is thus denied as moot.

Defendants' motion for a stay pending the outcome of rehabilitation procedures involving Legion Insurance Company is denied. The fact that defendant Bloomfield's insurer is presently in rehabilitation does not justify a stay of indefinite duration in contravention of plaintiff's right to have her claims resolved. Such a motion brought within four weeks of trial also weighs in favor of denying the motion considering the dubious benefits of granting the stay.

VI. CONCLUSION

Defendants' motion for summary judgment (Doc. 78) is **granted** on all counts except on plaintiff's count alleging a violation of § 1983 based on a procedural due process violation depriving her of her property interest in her continued employment. Plaintiff's cross-motion for summary judgment (Doc. 96) is **denied**. Defendants' motion to bifurcate the issue of punitive damages (Doc. 84) is **denied as moot**. Defendants' motion to stay (Doc. 85) is **denied**.

SO ORDERED.

Dated at New Haven, Connecticut, April __, 2002.

Peter C. Dorsey
United States District Judge

Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540, 547, 23 S.Ct. 754, 47 L. Ed. 1171 (1903)("The motive for the breach commonly is immaterial in an action on the contract."); Koufakis v. Carvel, 425 F.2d 892, 906 (2d Cir. 1970) ("A breach is a breach; it is of marginal relevance what motivations led to it."); Weiskopf v. American Kennel Club, Inc., NO. 00-CV-471, 2002 WL 1303022, at *6 n.1 (E.D.N.Y. June 11, 2002)(motive irrelevant to claim of breach of contract); Athridge v. Aetna Cas. and Sur. Co., NO. CIV.A. 96-270, 2001 WL 214212, at *3 (D.D.C. 2001)(same).